ORIGINAL

No. 88-7381

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILLIAM GEORGE BONIN,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION TO AMENDMENTS TO PETITION FOR CERTIORARI

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ADDITIONAL QUESTIONS PRESENTED

3. Whether the instructions given the jury allowed it to consider all mitigating evidence presented so as to have resulted in an individualized assessment as to the appropriateness of the death penalty as expressed in Lockett v. Ohio 438 U.S. 586 (1978).

4. Whether the instruction telling the jury "if you conclude that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of death" affected the proper scope of the jury's sentencing responsibility.

PARTIES

Petitioner, William George Bonin, is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin. California. Respondent is the People of the State of California.

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OPINION BELOW

Petitioner seeks review of an opinion of the California Supreme Court affirming his judgment of death. (People v. Bonin 47 Cal.3d 808 (1989).)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. section 1257 (3).

CONSTITUTION, STATUTES AND PROVISIONS INVOLVED

United States Constitution, Sixth, Eighth, and Fourteenth Amendments.

STATEMENT OF THE CASE

The statement of the case was presented in the original brief in opposition filed in this matter, No. 88-7381.

STATEMENT OF THE FACTS

The statement of the facts was presented in the original brief in opposition filed in this matter, No. 88-7381.

ARGUMENT

THE JURY WAS PROPERLY INSTRUCTED TO DETERMINE THE APPROPRIATE PENALTY BY WEIGHING THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING CIRCUMSTANCES, AND THAT IT "SHALL" RETURN THE VERDICT CONSISTENT WITH THE RESULT OF ITS WEIGHING PROCESS

In conformity with California Penal Code section 190.3, petitioner's jury was instructed on a list of 11 factors, was told to weigh the respective factors in aggravation against those in mitigation, and that it "shall" return the verdict consistent with the result of this weighing process, i.e. death if the jury concluded that the factors in aggravation outweighed those in mitigation and life without parole if it concluded that the factors in mitigation outweighed those in aggravation. (RT 5526-1-5526-3, 5526-29-5526-30.) Petitioner now contends the first instruction impermissibly limited the jury's consideration of petitioner's background and character. (Pet., pp. 4-8.) Further, petitioner contends the "shall" language misguided the jury by precluding it from exercising its discretion as to the appropriate penalty. (Pet., pp. 9-12.) Each of these contentions was adequately covered by the California Supreme Court in its decision and no new reason appears for a contrary result.

As concerns the issue involving the use of the word "shall," we recognize this issue is pending before this Court in another California case (Boyde v. California, No. 88-6613, cert. granted June 5, 1989), and also in a Pennsylvania case, Blystone v. Pennsylvania, No. 88-6222, cert. granted March 27, 1989. Neither case compels granting certiorari in this case. Before agreeing to review Boyde, the court denied certiorari in two other California cases which challenged the "shall" language of the state's statute and instructions. (Bonin v. California ___ U.S. ___, (1989) 103 L.Ed.2d 864, [Brennan, Marshall, JJ., dis.]; Hamilton v. California ___ U.S.___, (1989) 102 L.Ed.2d 1001, 1002-1004, [Marshall, J., dis.].) Moreover, the court has, on other occasions, denied petitions for certiorari, despite the fact that the issues were identical to those raised in pending cases. (See, e.g., King v. Lynaugh ___ U.S. ___, (1989) 103 L.Ed.2d 930, [certiorari and stay of execution denied over dissent that four other Texas cases with a similar issue had been stayed pending determination of Penry v. Lynaugh ___ U.S. ___, (1989) 57 U.S.L.Week 4953];[1/] Bundy v. Dugger ___ U.S. ___, (1989) 102 L.Ed.2d 1009 [stay denied over dissenting view that it should be stayed pending determination of Dugger v. Adams 489 U.S. ___, (1989) 103 L.Ed.2d 435];[2/] Daugherty v. Florida ___ U.S. ___, (1989) 102 L.Ed.2d 372 [stay denied over dissenting view that other Florida cases with similar issues were stayed pending determination of Dugger v. Adams, supra]; Poindexter v. Ohio ___ U.S. ___, (1998) 102 L.Ed.2d 261 [certiorari denied over dissenting view that case should be held pending determination of Dugger v. Adams, supra].) The pendency of Boyde does not compel the granting of this petition, or even a delay in considering it.

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1. King was executed on March 23, 1989. (N.Y. Times, March 23, 1989, § A, at p. 19, col. 1.)

2. Bundy was executed on January 25, 1989. (N.Y. Times, Jan. 23, 1989, § A, at p. 1, col. 5.)

In any event, the requirement that the jury "shall" return the death penalty it concludes that the circumstances in aggravation outweigh those in mitigation is not constitutionally impermissible. The court upheld use of a mandatory weighing process in Proffit v. Florida 428 U.S. 242 (1976), and another type of "mandatory" process in Jurek v. Texas 428 U.S. 262, 269 (1976), where the jury was required to return a verdict of death if its answers to the Texas special questions were all "yes."

The court upheld the California law in California v. Ramos 463 U.S. 992, 1005-1006, fn. 19 (1983), and an earlier version of the California law in Pulley v. Harris 465 U.S. 37, 53 (1984). (See, California v. Brown 479 U.S. 538, 540 (1987).)

California's procedure serves to "minimize the risk of wholly arbitrary and capricious action" (Gregg v. Georgia 428 U.S. 153, 188-189 (1976); promotes the rational and predictable administration of death penalty laws (California v. Brown, supra, at p. 541); provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not" (Furman v. Georgia 408 U.S. 238 (1972) [White, J., conc.]; and fosters reliability and further judicial review. (California v. Brown, supra, at p. 543.)

The California Supreme Court noted neither attorney cajoled the jury into "counting" of the respective factors. Neither attorney referred to the mandatory sentencing language of the statute. (People v. Bonin 47 Cal.3d 808, 857 (1989).)

While sentencers in a capital case may not be given unbridled discretion in determining the fate of those charged with capital offenses, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his "'"character or record and any of the circumstances of the offense."'" California v. Brown, supra, at p. 541.) This Court has also acknowledged these requirements "are somewhat in 'tension' with each other." (Franklin v. Lynaugh ___ U.S. ___, 108 S.Ct. 2320, 2331 (1989).)

In this regard, the jury at petitioner's penalty phase was instructed in accordance with the standard instruction listing eleven statutory factors in aggravation and mitigation including the catchall factor subdivision (k) which permitted the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (RT 5526-3.) Under California law each juror "is free to assign whatever moral or sympathetic value he deems appropriate" to each of the factors he is permitted to consider, including this last factor (People v. Brown 40 Cal.3d 512, (1985) rev'd. on other grounds, California v. Brown, supra, 479 U.S. 538), thereby making an "individualized assessment of the appropriateness of the death penalty" as required by the Constitution. (Penry v. Lynaugh, supra, 57 U.S.L.Week at p. 4692.) By weighing the various factors, the jury simply determines under California law "which penalty is appropriate in the particular case." (People v. Brown, supra, 40 Cal.3d at p. 541.)

In its review of the instant case, the California Supreme Court had no trouble deciding the jury understood its function. Petitioner contends the court's reference to the prosecutor's argument regarding petitioner's background was taken out of context since the prosecution's reference was a negative one. (Pet. p. 7.) Petitioner cannot have it both ways. Certainly, the prosecutor was well within his responsibilities to demonstrate to the jury why the death penalty was appropriate, to the same extent defense counsel argued petitioner's background warranted some mercy. This is the very individualized consideration sought by this Court. On both fronts, respective trial counsel accomplished their goals. The prosecutor told the jury to weigh and balance the respective factors to determine the appropriate penalty. (RT 5474.) In this regard the jury was told it could consider anything it heard in the courtroom, including evidence from the guilt phase. (RT 5475.) The prosecutor made specific reference to petitioner's background

while doing nothing to short circuit the jury's consideration of anything mitigating on petitioner's behalf. In fact, the prosecutor argued petitioner had received all the chances from the system he deserved. (RT 5487-5489.)

Defense counsel, on the other hand, focused on petitioner's family problems and on the fact he had been a useful citizen within the confines of a structured prison environment. (RT 5513-5524.) Counsel's entire argument dwelled on factors extenuating the gravity of petitioner's offenses, even though there was very little connection to the actual case. Thus, there was absolutely nothing said by either counsel which could have been interpreted as limiting the application of subdivision (k) in the jury's deliberations. As the California Supreme Court concluded, "indeed, in view of the foregoing, we believe that the jurors were led to consider the criminal as well as the crime and to weigh the defendant's background and character evidence in mitigation." (People v. Bonin, supra, 47 Cal.3d at p. 855.)

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No: 88-7381
October Term, 1989

WILLIAM GEORGE BONIN

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THE STATE OF CALIFORNIA

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION TO AMENDMENTS TO PETITION FOR CERTIORARI as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and nine (9) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

William Dean Freeman
Deputy State Public Defender
107 South Broadway, Suite 9111
Los Angeles, CA 90012

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 6th day of October, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 6, 1989.

ANNE MARIE BUFORD

Subscribed and sworn to before me
this 6th day of October, 1989.

JEAN M. FURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991

Notary Public in and for said County and State